LEE CHIN YONG v. MEDICAL DEFENCE MALAYSIA BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
QUAY CHEW SOON JC
[SUIT NO: WA-23NCvC-44-07-2020]
16 JULY 2021

ADMINISTRATIVE LAW: *Exercise of administrative powers – Government department – Third party proceedings against DBKL for approving and issuing development order that allegedly caused sewerage problems – Whether DBKL negligent in issuing development order – Whether DBKL has jurisdiction to consider or approve anything related to sewerage system – Whether power to grant approval of construction of sewerage system rests on Suruhanjaya Perkhidmatan Air Negara – Whether Federal Government has authority with respect to matters relating to sewerage systems and services with effect of enactment of Sewerage Services Act 1993 – Whether relief sought against DBKL could not be granted as matter of law – Whether claim against DBKL obviously unsustainable – Whether third party action ought to be set aside – Water Services Industry Act 2006, ss. 3, 45, 64(1) & 66 – Street, Drainage and Building Act 1974, s. 70(2)(a) & (b) – Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013, rr. 7, 9, 18, 24, 25 & 34 – Sewerage Services Act 1993, ss. 3, 31 & 46*

CIVIL PROCEDURE: *Third party proceedings – Setting aside – Application for – Action against Government department – Third party proceedings against DBKL for approving and issuing development order that allegedly caused sewerage problems – Whether DBKL negligent in issuing development order – Whether DBKL has jurisdiction to consider or approve anything related to sewerage system – Whether power to grant approval of construction of sewerage system rests on Suruhanjaya Perkhidmatan Air Negara – Whether Federal Government has authority with respect to matters relating to sewerage systems and services with effect of enactment of Sewerage Services Act 1993 – Whether relief sought against DBKL could not be granted as matter of law – Whether claim against DBKL obviously unsustainable – Whether third party action ought to be set aside – Water Services Industry Act 2006, ss. 3, 45, 64(1) & 66 – Street, Drainage and Building Act 1974, s. 70(2)(a) & (b) – Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013, rr. 7, 9, 18, 24, 25 & 34 – Sewerage Services Act 1993, ss. 3, 31 & 46*

STATUTORY INTERPRETATION: *Construction of statutes – Interpretation – Distinction between s. 70(2)(a) and s. 70(2)(b) of Street, Drainage and Building Act 1974 – Whether matters relating to sewerage system fall outside DBKL's scope of responsibility – Applicability of Water Services Industry Act 2006 – Whether Federal Government has authority with respect to all matters relating to sewerage*

systems and services – Whether Federal Government exercises authority through Suruhanjaya Perkhidmatan Air Negara – Whether DBKL cloaked with any powers on matters related to sewerage system – Sewerage Services Act 1993, ss. 3, 31 & 46 – Water Services Industry Act 2006, ss. 3, 45, 64(1), 66 – Street, Drainage and Building Act 1974, s. 70(2)(a) & (b) – Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013, rr. 7, 9, 18, 24, 25 & 34 – Sewerage Services Act 1993, ss. 3, 31 & 46

The main suit involved a dispute between two neighbours *ie*, the plaintiff and the defendant, who were purchasers of properties on the secondary market *ie*, bungalow houses in Taman Bandaraya, Kuala Lumpur. The dispute arose as a result of a blockage located within the piping of the underground sewerage system which connected their property to each other. The underground sewerage pipe from the defendant's property goes through the plaintiff's property underground before reaching the main sewerage pipe maintained by Indah Water Konsortium underground on the main road of Lorong Kemaris 4, Taman Bandaraya, Kuala Lumpur. The plaintiff commenced a suit against the defendant, claiming that no easement was ever granted for the defendant to flow the sewage from the defendant's property through the plaintiff's property. The plaintiff averred that due to the blockage, the defendant's sewage was being discharged directly into the plaintiff's property. In its statement of defence, the defendant asserted that the sewerage system problem started after the renovation works were done on the plaintiff's property. The defendant pleaded that the blockage was due to the said renovation work which caused the defendant's property to be deprived of access to the existing sewerage system. The defendant averred that the connected sewerage system of the defendant's property to the plaintiff's property had existed since their properties were built. The defendant in turn lodged a counterclaim against the plaintiff. In its counterclaim, the defendant sought a declaration that the plaintiff was to repair the sewerage system at his property and rectify the blockage to ensure the flow of sewage from the defendant's property to the public sewerage system was restored. The defendant also prayed for special, general and exemplary damages. The defendant commenced these third party proceedings against DBKL because it had approved and issued a development order in February 2012 to the plaintiff to demolish and rebuild his property. The development order was issued by DBKL pursuant to s. 70 of the Street, Drainage and Building Act 1974 ('SDB Act'). The defendant's complaint was that DBKL was negligent in issuing the development order because: (i) DBKL failed to inspect the existing sewerage system in the plaintiff's property before issuing the development order; (ii) DBKL failed to assess the impact that the sewerage system in the plaintiff's property may have in environment before issuing the development order; and (iii) DBKL

issued the plaintiff a certificate of fitness for occupation following the renovation work despite the blockage. DBKL filed an action *vide* encl. 48 ('encl. 48') under O. 16 r. 6 and O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 to set aside the defendant's third party notice and statement of claim. DBKL contended that the defendant had no maintainable cause of action against it because: (i) DBKL's duties regarding the development order arose pursuant to the SDB Act and the by-laws enacted thereunder, namely the Uniform Building By-Laws 1984 ('By-laws'); (ii) all matters relating to sewerage system does not fall under the SDB Act and DBKL had no power to issue any approvals for the same; (iii) therefore, it was not on DBKL to carry out the matters that the defendant complained of prior to the issuance of the development order; (iv) the legislation governing sewerage system was the Water Services Industry Act 2006 ('WSI Act') read together with the Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013 ('WSI Rules'); (v) the statutory authority in charge of all matters related to the sewerage system was Suruhanjaya Perkhidmatan Air Negara ('SPAN'). This was as per ss. 3 and 45 of the WSI Act read with rr. 7, 9, 18, 24 and 25 of the WSI Rules; and (vi) thus, it was SPAN (and not DBKL) who was the body responsible to carry out the actions that the defendant complained of. As such, the defendant's grievances should be channelled to SPAN and DBKL could not be liable.

Held (allowing encl. 48):

(1) The defendant's grievance against DBKL was centred around the assumption that DBKL must factor in and approve matters related to sewerage system when issuing the development order and thus, owed a duty of care. This assumption was misplaced and could not stand in law. The development order was given in February 2012 pursuant to s. 70 of the SDB Act. The provisions of the SDB Act are applicable to determine whether there is such a duty on DBKL. DBKL derives its powers from the SDB Act. Section 70(2)(a) and (b) of the SDB Act is relevant because it is the starting point for the issuance of the development order, which was at the nub of the defendant's complaint. (paras 19-21)

(2) There is a clear distinction between s. 70(2)(a) ('sub-s. (a)') and s. 70(2)(b) ('sub-s. (b') of the SDB Act. This difference has a bearing on the dispute and show that matters relating to sewerage system (approvals, inspections *etc*) fall outside DBKL's scope of responsibility. Under sub-s. (a), one who intends to erect a building must submit to DBKL (the local authority) such plans as required under the By-Laws made pursuant to the SDB Act. In contrast, under sub-s. (b), one who

A intends to erect a building must also submit to the 'relevant statutory authority' such plans as required by 'any other written law'. This was an additional requirement over and above sub-s. (a). It was apparent that DBKL was to consider and approve only such plans and specifications that may be required under the By-laws. There was nothing in the B By-laws enacted pursuant to the SDB Act which discussed 'sewerage system'. As such, DBKL had no jurisdiction to consider or approve anything related to 'sewerage system'. Any approval would be *ultra vires* the SDB Act as DBKL would be exercising powers which it did not possess. (para 22)

C **(3)** DBKL did not process the plans labelled 'Diagramatik Susunatur Pembentungan Dalaman' and 'Diagramatik Susunatur Bekalan Air Dalaman' submitted by the plaintiff when applying for the development order. Instead, DBKL wrote the words 'DIBATALKAN' on them. The words 'DIBATALKAN' meant that DBKL did not consider these D specific plans in issuing the development order. This was rightly so since those plans were related to 'sewerage system', which did not come within the purview of DBKL under the SDB Act. Consequently, since DBKL need not consider or approve matters pertaining to sewerage system prior to issuing the development order, the defendant's E complaint could not stand because: (i) there was no duty in law on DBKL to inspect the pre-existing sewerage system in the plaintiff's property before issuing the development order; (ii) there was also no duty in law on DBKL to assess the impact that the sewerage system in the plaintiff's property may have in environment before issuing the development order; and (iii) the development order did not constitute F DBKL's approval of the new sewerage system which the plaintiff planned to build because DBKL did not have the power to give any such approvals. (para 22)

(4) The written law governing sewerage system would be the WSI Act and G the relevant authority pursuant thereto would be SPAN, the 'Commission' referred to in the WSI Act. The WSI Act came into force on 1 January 2008 and replaced the Sewerage Services Act 1993 ('Sewerage Services Act'). Since the plaintiff applied for the development order in January 2012, the WSI Act is applicable as it was (and still is) the operative legislation. Sections 3 and 45 of the WSI Act H and rr. 7 and 9 of the WSI Rules specified that it was SPAN (and not DBKL) who had the sole jurisdiction and power to grant approval for the construction of the sewerage system. Therefore, as the approving authority, any necessity to inspect the existing sewerage system or to carry out an environmental impact assessment of the existing sewerage I system in the plaintiff's property rested on SPAN (and not DBKL). The issuance of the development order stood separate from SPAN's approval

of the plaintiff's new proposed sewerage system. Both are governed by different legislations. The approval of one does not equate to the approval of the other. The wordings of ss. 3 and 45 of the WSI Act read with rr. 7 and 9 of the WSI Rules show that DBKL had no jurisdiction to give any approval under the development order for the plaintiff's new proposed sewerage system. If the defendant's complaints were upheld, it would effectively mean that DBKL would usurp the functions and jurisdiction of SPAN. (paras 29, 30, 36-39 & 40)

(5) Rules 18, 24 and 25 of the WSI Rules specify that any duty to carry out inspection falls on SPAN (and not DBKL). Thus, the defendant's complaint against DBKL in this respect could not stand. If there was failure to carry out any inspection of the sewerage system in the plaintiff's property, DBKL was not answerable for the same. Rule 34 of the WSI Rules specify that the 'competent person' (and not DBKL) shall be entirely responsible and liable for any failure in the design, construction or installation of the new sewerage system in the plaintiff's property. This was relevant since the defendant complained that the renovation work caused the blockage. The 'competent person' would be the architect who signed off on the relevant plans for the plaintiff's new proposed sewerage system. Based on r. 34 of the WSI, DBKL could not be held responsible for any failure of the sewerage system which may have caused the blockage as it was not the party that could be held liable. DBKL was not the regulator duty-bound to ensure that the plaintiff adhered to the sewerage plans. Nothing turned on the fact that DBKL did not take any action because DBKL was not cloaked with the power to do so in the first place. (paras 41-44)

(6) The defendant's contention that the plaintiff and the defendant inherited the sewerage system approved by DBKL in the 1970s when they came to their own properties in 2013, and since DBKL approved the same back in the 1970s and was the body responsible for the existing sewerage system and must be held accountable for the present blockage, was devoid of merit. The legislation governing sewerage system had evolved twice, once in 1993 and again in 2006. This progress in legislation has an impact on the present dispute. Prior to 1993, DBKL was cloaked with the authority to grant approval for the sewerage system, pursuant to certain provisions of the SDB Act then. But this changed in 1993 with the enactment of the Sewerage Services Act. By virtue of s. 3 of the Sewerage Services Act, the Federal Government would have Executive authority over everything related to the sewerage system. (paras 49-51)

(7) Based on s. 46(2) of the Sewerage Services Act, DBKL's approval given in the 1970s would now be deemed to have been approved by the Federal Government pursuant to s. 31 of the Sewerage Services Act. Based on s. 46(4) of the Sewerage Services Act, all liabilities of DBKL arising prior to the Sewerage Services Act shall be subject to the provisions of the Sewerage Services Act. There was no mention about any residual liabilities that local councils may have to shoulder. It stood to reason that no liability could arise against DBKL, more so given s. 46(2). Reading both together, since DBKL's approval given in the 1970s was deemed to have been approved by the Federal Government *via* the Director General of Sewerage Services as per s. 46(2), it followed that any liability arising therefrom would similarly vest with the Federal Government from 1993 onwards and not with DBKL anymore. In light of this, DBKL could not be said to have acted negligently in the manner in which the defendant put it. (paras 54-57)

(8) The indemnity sought by the defendant against DBKL could not be granted because the relief that the plaintiff sought was against the defendant in person. For instance, the declarations sought related to the rights of the plaintiff and the defendant *inter se*. DBKL was in no position to give an indemnity on either the declaration of rights of the parties *inter se* or injunctive orders sought to restrain the defendant, as those reliefs were personal to the defendant. Furthermore, the defendant sought a declaration order that DBKL was to carry out and supervise the immediate repair work of the blockage located within the sewerage system connecting the plaintiff's property and the defendant's property. Such a relief could not be granted in law since DBKL was not cloaked with any powers on matters related to the sewerage system. Neither under the SDB Act or the WSI Act is DBKL empowered to carry out remedial works on the sewerage system. As such, an additional ground for this court to strike out this action was because it was brought to obtain relief which the court had no power to grant. Therefore, the inescapable conclusion was that the defendant's claim against DBKL was obviously unsustainable and was bound to fail. (paras 68-70, 80 & 84)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Drummond-Jackson v. British Medical Association & Ors [1970] 1 WLR 688 ***(refd)***

DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor [2002] 2 CLJ 57 FC ***(refd)***

Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim [2013] 6 CLJ 849 CA ***(refd)***

McKay & Anor v. Essex Area Health Authority & Anor [1982] 1 QB 1166 ***(refd)***

Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd [1993] 3 CLJ 606 SC ***(refd)***
Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 2 CLJ 29 FC ***(refd)***
Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals [1996] 1 CLJ 393 CA ***(refd)***

Legislation referred to:
Interpretation Acts 1948 and 1967, s. 17A
Rules of Court 2012, O. 16 r. 6, O. 18 r. 19(1)(a), (b), (c), (d)
Sewerage Services Act 1993, ss. 3, 31, 46(2), (4)
Street, Drainage and Building Act 1974, ss. 3, 70(2)(a), (b), (3)(c), 77
Water Services Industry Act 2006, ss. 3(2), 45(1), (7), 64(1), 66, 186
Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013, rr. 6(3), 7, 9, 18(1), 24(1), 25, 27, 34

For the defendant - Anit Kaur Randhawa; M/s Asbir, Hira Singh & Co
For the 3rd party - Jaqdesh Singh & Sofina Thafiqah Zulkifli; M/s Theselim Mohd Yusoff & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Quay Chew Soon JC:

Introduction

[1] The first third party ("Indah Water") is a national sewerage company entrusted to develop and maintain the sewerage system (including the underground sewerage system) in Malaysia. Indah Water also provide sewerage services such as the collection, conveyance, treatment and disposal of sewage, and includes the operation and maintenance of a sewerage system and the desludging of septic tank.

[2] The second third party ("SPAN") is a body established under s. 3 of the Suruhanjaya Perkhidmatan Air Negara Act 2006. SPAN is vested with powers to supervise and regulate water supply services and sewerage services, and to enforce the water supply and sewerage services laws.

[3] The third third party ("DBKL") is a body responsible for administration and management of public health, waste disposal, urban planning, environmental protection, economic and social development and general maintenance for urban infrastructure of the Federal Territory of Kuala Lumpur.

[4] DBKL filed an application *vide* encl. 48 ("encl. 48") to set aside the defendant's ("D") third party notice dated 30 July 2020 and statement of claim dated 23 September 2020. Enclosure 48 is made under O. 16 r. 6 and O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012.

[5] D had also instituted third party action against Indah Water and SPAN. However, D has since discontinued its action against Indah Water and SPAN, without liberty to file afresh.

[6] I allowed encl. 48 and set aside D's third party proceedings against DBKL. These are the grounds of my decision.

Background

[7] The main suit involves a dispute between two neighbours ie, the plaintiff ("P") and D. P and D are both purchasers of properties on the secondary market ie, bungalow houses in Taman Bandaraya, Kuala Lumpur. Their properties are situated back to back.

[8] The dispute arose as a result of a blockage located within the piping of the underground sewerage system which connects their property to each other. The underground sewerage pipe from D's property go through P's property underground before reaching the main sewerage pipe maintained by Indah Water underground on the main road of Lorong Kemaris 4, Taman Bandaraya, Kuala Lumpur.

[9] P commenced a suit against D claiming no easement was ever granted for D to flow the sewage from D's property through P's property. P avers that due to the blockage, D's sewage is being discharged directly into P's property.

[10] In its statement of defence, D asserts that the sewerage system problem started after the renovation work done on P's property. D pleaded that the blockage was due to the said renovation work which caused D's property to be deprived of access to the existing sewerage system. D avers that the connected sewerage system of D's property to P's property has existed since their properties were built.

[11] D in turn lodged a counterclaim against P. In its counterclaim, D sought a declaration order that P is to repair the sewerage system at his property and rectify the blockage to ensure the flow of sewage from D's property to the public sewerage system is restored. D also prayed for special damages, general damages and exemplary damages.

[12] D commenced these third party proceedings against DBKL because it approved and issued a development order in February 2012 to P to demolish and rebuild his property. The development order was issued by DBKL pursuant to s. 70 of the Street, Drainage and Building Act 1974 ("SDB Act").

The Parties' Case

[13] D's complaint is that DBKL was negligent in issuing the development order because:

(i) DBKL failed to inspect the existing sewerage system in P's property before issuing the development order;

(ii) DBKL failed to assess the impact that the sewerage system in P's property may have on environment before issuing the development order; and

(iii) DBKL issued P a certificate of fitness for occupation following the renovation work despite the blockage.

[14] DBKL contends that D has no maintainable cause of action against it because:

(i) DBKL's duties re the development order arises pursuant to the SDB Act and the bylaws enacted thereunder, namely the Uniform Building By-laws 1984 ("By-laws");

(ii) all matters relating to sewerage system do not fall under the SDB Act and DBKL has no power to issue any approvals for the same;

(iii) therefore, it is not on DBKL to carry out the matters that D complains of prior to the issuance of the development order;

(iv) the legislation governing sewerage system is the Water Services Industry Act 2006 ("WSI Act") read together with the Water Services Industry (Planning, Design and Construction of Sewerage System and Septic Tank) Rules 2013 ("WSI Rules");

(v) the statutory authority in charge of all matters related to sewerage system is SPAN. This is as per ss. 3 and 45 of the WSI Act read with rr. 7, 9, 18, 24 and 25 of the WSI Rules; and

(vi) thus, it is SPAN (and not DBKL) who is the body responsible to carry out the actions that D complains of. As such, D's grievances should be channelled to SPAN, and DBKL cannot be liable.

[15] In January 2012, P (*via* his architect) applied to DBKL for permission to demolish and rebuild P's premises. Amongst the plans submitted were plans of a new proposed sewerage system to be built in P's property. DBKL did not process these particular plans which concerned P's new proposed sewerage system as it had no jurisdiction to do so and instead, marked them with the words "DIBATALKAN".

[16] In February 2012, DBKL issued the development order. It is DBKL's position that the development order excludes any approval of P's new proposed sewerage system since DBKL has no jurisdiction to approve the same. The renovation work was completed *circa* 2017. However, no certificate of fitness for occupation has been issued to date.

[17] In December 2019, D learnt of the blockage located within the piping of the underground sewerage system which connects its property to P's property. D pleaded that the blockage arose after the renovation work was carried out. It is D's case that but for DBKL's negligence in issuing the development order, the blockage would not have occurred.

Decision

[18] I am satisfied that D's claim against DBKL is obviously unsustainable. It is plain and obvious to me that D's action against DBKL ought to be struck out. (See the Supreme Court case of *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 3 MLJ 36; [1993] 2 AMR 1969; [1993] 1 MLRA 611). My reasons are as follows.

No Duty On DBKL As Alleged By Defendant Given The Provisions Of The Street, Drainage And Building Act 1974

[19] D's grievance against DBKL is centred around the assumption that DBKL must factor in and approve matters related to sewerage system when issuing the development order and thus, owes a duty of care. This assumption is misplaced and cannot stand in law.

[20] The development order was given in February 2012 pursuant to s. 70 of the SDB Act. Thus, the provisions of the SDB Act are applicable to determine whether there is such a duty on DBKL. This is because DBKL derives its powers from the SDB Act.

[21] Section 70(2)(a) and (b) of the SDB Act is relevant because it is the starting point for the issuance of the development order (which is at the nub of D's complaint). It reads:

> 70(2) Any person who intends to erect any building shall cause to be submitted by a principal submitting person or submitting person:
>
> (a) to the local authority such plans and specifications as may be required by any by-law made under this Act;
>
> (b) to the **relevant statutory authority** such plans and specifications as may be required by **any other written law**; (emphasis added)

[22] There is a clear distinction between s. 70(2)(a) ("sub-s. (a)") and s. 70(2)(b) ("sub-s. (b)") of the SDB Act. This difference has a bearing on the dispute and shows that matters relating to sewerage system (approvals, inspections, etc) fall outside DBKL's scope of responsibility. This is because:

(i) under sub-s. (a), one who intends to erect a building must submit to DBKL (the local authority) such plans as required under the By-Laws made pursuant to the SDB Act;

(ii) in contrast, under sub-s. (b), one who intends to erect a building must also submit to the "relevant statutory authority" such plans as required by "any other written law". This is an additional requirement over and above sub-s. (a);

(iii) it is apparent that DBKL is to consider and approve only such plans and specifications that may be required under the By-Laws;

(iv) there is nothing in the By-Laws enacted pursuant to the SDB Act which discuss "sewerage system";

(v) as such, DBKL has no jurisdiction to consider or approve anything related to "sewerage system". Any approval would be *ultra vires* the SDB Act as DBKL would be exercising powers which it does not possess;

(vi) this point is supported by the fact that DBKL did not process the plans labelled "Diagramatik Susunatur Pembentungan Dalaman" and "Diagramatik Susunatur Bekalan Air Dalaman" submitted by P when applying for the development order. Instead, DBKL wrote the words "DIBATALKAN" on them;

(vii) the words "DIBATALKAN" meant that DBKL did not consider these specific plans in issuing the development order. This is rightly so since those plans relate to "sewerage system", which do not come within the purview of DBKL under the SDB Act;

(viii) consequently, since DBKL need not consider or approve matters pertaining to sewerage system prior to issuing the development order, D's complaint cannot stand because:

(a) there is no duty in law on DBKL to inspect the pre-existing sewerage system in P's property before issuing the development order, as D alleges;

(b) there is also no duty in law on DBKL to assess the impact that the sewerage system in P's property may have in environment before issuing the development order, as D alleges; and

(c) the development order does not constitute DBKL's approval of the new sewerage system which P plans to build because DBKL did not have the power to give any such approvals;

(ix) applying sub-s. (b), it fell on P to submit those plans labelled "Diagramatik Susunatur Pembentungan Dalaman" and "Diagramatik Susunatur Bekalan Air Dalaman" to the "relevant statutory authority" (and not DBKL) as required by "any other written law" for approval.

[23] Section 3 of the SDB Act defines "sewerage system" as follows:

> "sewerage system" has the same meaning assigned to it under the Sewerage Services Act 1993;

[24] The Sewerage Services Act 1993 ("Sewerage Services Act") was enacted 28 years ago to consolidate the laws relating to sewerage system from the local councils throughout Malaysia, such as DBKL, and vest it with the Federal Government. In other words, the Federal Government would take over everything related to sewerage system from local councils. This includes the Federal Government taking over all rights and liabilities from the local councils, DBKL included.

[25] Section 3 of the Sewerage Services Act stipulates that the Federal Government, exercising its powers through the Director General of Sewerage Services, shall have authority and purview over sewerage related matters. It reads:

> The Federal Government shall, upon coming onto operation of this Act, have executive authority with respect to **all matters relating to sewerage systems and sewerage services throughout Malaysia.**
>
> (emphasis added)

[26] When the Sewerage Services Act was introduced, sub-s. (b) of the SDB Act was amended as follows in 1993 to synchronise itself with the Sewerage Services Act:

> 70(2) Any person who intends to erect any building shall submit:
>
> (a) to the local authority such plans and specifications as may be required by any bylaws made under this Act;
>
> (b) to the relevant statutory authority such plans and specifications **in respect of the sewerage system** as may be required by any other written law. (emphasis added)

[27] Subsequently, the Sewerage Services Act was repealed and replaced by the WSI Act. Accordingly, the WSI Act would be the applicable legislation in this matter. When the WSI Act was introduced, sub-s. (b) of the SDB Act was amended in 2007 into its current form to bring it in harmony with the WSI Act.

[28] *Via* the 2007 amendment, the words "in respect of the sewerage system" was removed from the amended sub-s. (b) of the SDB Act. This appears to widen the scope of sub-s. (b) and not restrict it to only plans relating to "sewerage system".

The Water Services Industry Act 2006 Is Applicable And The Party Responsible To Carry Out Inspections And Environmental Impact Assessments Would Not Be DBKL

[29] If the SDB Act does not apply, what then is the "any other written law" which governs sewerage system and who is the "relevant statutory authority" pursuant thereto? The answer is this. The written law governing sewerage system would be the WSI Act. And the relevant statutory authority pursuant thereto would be SPAN, the "commission" referred to in the WSI Act.

[30] The WSI Act came into force on 1 January 2008 and replaced the Sewerage Services Act. Since P applied for the development order in January 2012, the WSI Act is applicable as it was (and still is) the operative legislation.

[31] Section 3(2) of the WSI Act stipulates that the Federal Government shall continue to have authority with respect to all matters relating to sewerage systems and sewerage services throughout Malaysia. And will exercise its authority through SPAN. Arising therefrom, s. 45 of the WSI Act stipulates that SPAN is responsible to give approvals regarding the construction of sewerage system.

[32] Section 45(1) of the WSI Act reads:

> No person shall **construct, alter, modify,** disconnect or close up a water supply system, sewerage system, septic tank, individual internal sewerage piping or **common internal sewerage piping** unless the relevant plans or specifications which requires the approval of the Commission have first been approved in writing by the Commission. (emphasis added)

[33] It appears P should have submitted the plans labelled "Diagramatik Susunatur Pembentungan Dalaman" and "Diagramatik Susunatur Bekalan Air Dalaman" to SPAN (and not DBKL) for SPAN's consideration. Thereafter, SPAN (as the approving authority) was to do the needful (such as carrying out any inspection of the existing sewerage system or conducting any environmental impact assessment) before issuing its approval to P.

[34] Under s. 45(1) of the WSI Act, the approval of any local authority, such as DBKL, is not needed when considering any application pertaining to sewerage system. All that is necessary is for SPAN's approval and DBKL plays no part in the process.

[35] Under s. 45(7) of the WSI Act, it is a criminal offence for anyone to construct, alter or modify a sewerage system without first securing approval from SPAN.

[36] Section 45(1) of the WSI Act is to be read together with the WSI Rules, the applicable rules for the planning, design, construction and inspection of sewerage system. The following WSI Rules are relevant and have a bearing on D's grievances:

(i) rule 7 stipulates that "the competent person shall apply to the Commission for the approval of sewerage planning for sewerage works or septic tank works";

(ii) a "competent person" is defined as an architect or engineer, as per Schedule 1 of the WSI Rules;

(iii) rule 6(3) sets out the factors that should be taken into account when planning for sewerage works. Amongst those factors are the layout and location of the sewerage system, the connection point to the existing sewerage system and the integration of the proposed sewerage works with the existing sewerage system;

(iv) rule 9 stipulates that "the Commission may approve the sewerage planning or the amended sewerage planning and may impose such terms and conditions as it deems fit;

(v) rule 18(1) stipulates that "the Commission or any person authorised by the Commission may inspect the sewerage works or septic tank works at any time deemed necessary by the Commission";

(vi) rule 24(1) discusses intermediate inspection and stipulates that "the competent person shall notify the Commission when the sewerage works will be ready for intermediate inspection";

(vii) rule 25 stipulates that "upon the completion of the sewerage works, the competent person shall notify the Commission of the date for final inspection of the sewerage works";

(viii) rule 27 stipulates that SPAN "may issue a letter of confirmation if the Commission is satisfied that the sewerage works or the septic tank works has been constructed in accordance to these Rules"; and

(ix) rule 34 stipulates that notwithstanding any approval, inspection or certification by the Commission, the "competent person shall be wholly responsible for the design, quality of construction and installation of the sewerage works and the septic tank works and shall remain liable for any defects or failure in the design, construction and installation of the sewerage works and septic tank works including defects or failure in treatment process and structural stability.

[37] It is my finding that D's claim against DBKL is obviously unsustainable for the following reasons.

[38] Firstly, ss. 3 and 45 of the WSI Act and rr. 7 and 9 of the WSI Rules specify that it is SPAN (and not DBKL) who has the sole jurisdiction and power to grant approval for the construction of sewerage system. Therefore, as the approving authority, any necessity to inspect the existing sewerage system or to carry out an environmental impact assessment of the existing sewerage system in P's property rests on SPAN (and not DBKL).

[39] The issuance of the development order stands separate from SPAN's approval of P's new proposed sewerage system. Both are governed by different legislation. The approval of one does not equate to the approval of the other.

[40] The wordings of ss. 3 and 45 of the WSI Act read with rr. 7 and 9 of the WSI Rules show that DBKL has no jurisdiction to give any approval under the development order for P's new proposed sewerage system. If D's complaints were upheld, it would effectively mean that DBKL will usurp the functions and jurisdiction of SPAN.

[41] Secondly, rr. 18, 24 and 25 of the WSI Rules specify that any duty to carry out inspection falls on SPAN (and not DBKL). Thus, D's complaint against DBKL in this respect cannot stand. If there was failure to carry out inspection of the sewerage system in P's property, DBKL is not answerable for the same.

[42] Thirdly, r. 34 of the WSI Rules specify that the "competent person" (and not DBKL) shall be entirely responsible and liable for any failure in the design, construction of installation of the new sewerage system in P's property. This is relevant since D complains that the renovation work caused the blockage.

[43] The "competent person" would be the architect who signed off on the relevant plans for P's new proposed sewerage system. Based on r. 34 of the WSI, DBKL cannot be held responsible for any failure of the sewerage system which may have caused the blockage as it is not the party that can be held liable.

[44] Fourthly, D contends that DBKL "ought to have regulated that P or his agents did not continuously block D's property's connection to the underground connected sewerage system and hold true to its undertaking in the plans". This complaint is untenable since DBKL is not the regulator duty-bound to ensure that P adheres to the sewerage plans. Nothing turns on the fact that DBKL did not take any action because DBKL is not cloaked with the power to do so in the first place.

[45] This is bolstered by s. 64(1) of the WSI Act which empowers SPAN to take steps to rectify any issue that may arise from sewerage system. It reads:

64. Power to require private sewerage system, etc., to be put in proper order

(1) If the Commission is satisfied that:

(a) a **private sewerage system,** septic tank, individual internal sewerage piping or **common internal sewerage piping** on any premises or which serves any premises; or

(b) a **private connection pipe** connecting any premises to a public sewerage system,

is defective or is not properly maintained or is **in need of repair,** the Commission may issue a direction to the **owner**, management corporation **or occupier** of such premises or the owner of or the management corporation responsible for the private sewerage system, septic tank, individual internal sewerage piping, common internal sewerage piping or private connection pipe to have such private sewerage system, septic tank, individual internal sewerage piping, common internal sewerage piping or private connection pipe **repaired or put in proper order** within the period specified in the direction. (emphasis added)

[46] Further, s. 66 of the WSI Act stipulates that the owner of any private sewerage system which "is so foul or is in such a state or so situate as to be a nuisance or a danger to health" commits a criminal offence. SPAN may direct the owner or occupier of the premises "to abate such nuisance, harm or danger". Failing which, SPAN "may abate such nuisance, harm or danger and the expenses incurred by the Commission" shall be borne by the owner or occupier of the premises.

[47] Such provisions are absent from the SDB Act. This demonstrates that the relevant regulator with regard to sewerage system is not DBKL.

DBKL Cannot Be Held Liable For Any Approval Given In The 1970s

[48] P and D came to own their respective properties around 2013. Their properties are located in an area built and developed by one Bandaraya Developments Sdn Bhd in the 1970s. The existing sewerage system which came with their properties was constructed in the 1970s. DBKL approved the design of the existing sewerage system in the 1970s.

[49] D contends that P and D inherited the sewerage system approved by DBKL in the 1970s when they came to own their properties in 2013. Since DBKL approved the same back in the 1970s, it is the body responsible for the existing sewerage system, even up to this day. Therefore, DBKL must be held accountable for all issues arising out of it, including the present blockage.

[50] D's contention is devoid of merit. The legislation governing sewerage system has evolved twice, once in 1993 and again, in 2006. This progress in legislation has an impact on the present dispute.

[51] Prior to 1993, DBKL was cloaked with the authority to grant approval for sewerage system, pursuant to certain provisions of the SDB Act then. But this changed in 1993 with the enactment of the Sewerage Services Act. By virtue of s. 3 of the Sewerage Services Act, the Federal Government would have Executive authority over everything related to sewerage system.

[52] Accordingly, the SDB Act was amended in 1993 to remove these powers from DBKL since these powers had now shifted and vested with the Federal Government. Section 46 of the Sewerage Services Act is material as it is the "savings and transitional" provision. It is the "bridge" between the old provisions of the SDB Act which originally governed sewerage system (which were removed in 1993) and the newly enacted Sewerage Services Act which took over.

[53] Section 46 of the Sewerage Services Act reads:

> 46. Savings and transitional
>
> (1) Nothing shall affect the past operation of, or anything done under the provisions of, any law relating to sewerage systems and services passed before the date of coming into operation of this Act.
>
> (2) **Any plans** or specifications in respect of any sewerage system or septic tank **approved under any other written law before** the date of coming into operation of this Act **shall be deemed to have been approved under section 31.**
>
> (3) The provisions of subsections 32(1) and (2) shall not apply to any person who, on the date of coming into operation of this Act, was carrying on any of the acts described in subsection 32(1) until the expiration of six months from that date or the final determination of his application for a licence under this Act, whichever is the later.
>
> (4) Notwithstanding subsection (1), **any** right, liberty, privilege, **obligation or liability existing immediately before** the date of coming into operation of this Act by virtue of any law relating to sewerage systems or sewerage services in force before that date **shall, except as may be expressly provided in this Act, be subject to the provisions of this Act.**

[54] Based on s. 46(2) above, DBKL's approval given in the 1970s would now be deemed to have been approved by the Federal Government pursuant to s. 31 of the Sewerage Services Act. Section 31 of the Sewerage Services Act reads:

> 31. Approval required for construction of sewerage system or septic tank
>
> (1) No person shall construct any sewerage system or septic tank without the prior written permission of the Director General approving the plans and specifications of the proposed sewerage system or septic tank.

[55] Further, based on s. 46(4) above, all liabilities of DBKL arising prior to the Sewerage Services Act shall be subject to the provisions of the Sewerage Services Act. There is no mention about any residual liabilities that local councils may have to shoulder. It stands to reason that no liability can arise against DBKL, more so given s. 46(2) above.

[56] Reading both together, since DBKL's approval given in the 1970s is deemed to have been approved by the Federal Government *via* the Director General of Sewerage Services as per s. 46(2), it follows that any liability arising therefrom would similarly vest with the Federal Government from 1993 onwards. And not with DBKL anymore, as D contends.

[57] By virtue of s. 46 of the Sewerage Services Act, DBKL cannot be held liable for any approval it gave in the 1970s. As any responsibility or liability thereto is deemed to be taken over by the Federal Government in 1993. In light of this, DBKL cannot be said to have acted negligently in the manner in which D puts it. This resonates with the underlying objective of the Sewerage Services Act, which was for the Federal Government to take over and become the exclusive authority with regard to sewerage system.

[58] In *Selva Vinayagam Sures v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 2 CLJ 29 at p. 44, the Federal Court held that the interpretation and construction of any written law shall have regard to the underlying purpose or object of the legislation in question.

[59] Such purposive approach is given statutory recognition by s. 17A of the Interpretation Acts 1948 and 1967 which reads:

> 17A. Regard to be had to the purpose of Act
>
> In the interpretation of a provision of an Act, a construction that would **promote the purpose or object underlying the Act** (whether that purpose or object is expressly stated in the Act or not) **shall be preferred** to a construction that would not promote that purpose or object.
>
> (emphasis added)

[60] In pursuing the purposive approach, one of the matters that can assist the court is to refer to the Parliamentary reports or Hansard. (See the Federal Court case of *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; [2002] 2 MLJ 11 at p. 21).

[61] When the Sewerage Services Bill 1993 was debated in Parliament on 22 July 1993, the Minister for Housing and Local Government, who proposed the Bill, stated the following:

> Perkara pembentungan sebagai perkara bersama di antara Kerajaan Persekutuan dan Kerajaan Negeri juga telah menimbulkan beberapa masalah seperti persoalan pembiayaan projek, pertindihan tugas dan kuasa serta kekurangan dasar seragam yang diamalkan.

…

Tuan Yang di-Pertua, memandangkan bahawa setakat ini masalah perkhidmatan pembentungan tidak dapat diatasi dengan memuaskan oleh pihak berkuasa tempatan maka *Kerajaan Persekutuan telah memutuskan untuk mengambilalih tanggungjawab terhadap semua perkara yang berkaitan dengan sistem dan perkhidmatan pembentungan daripada pihak berkuasa tempatan.*

…

Tuan Yang di-Pertua, sejajar dengan *pengambilalihan tanggungjawab terhadap sistem pembentungan* adalah wajar *semua aset alih dan aset tidak alih* seperti tanah serta sistem pembentungan dan *hutang piutang* pihak berkuasa tempatan berkaitan dengan pembentungan *yang sedia ada juga diambil alih* oleh Kerajaan Persekutuan. (emphasis added)

[62] It seems that the oversight and management of existing sewerage system prior to 1993 was facing a multitude of problems as it was fragmented. Thus, the underlying purpose or object of the Sewerage Services Act was to consolidate everything centrally with the Federal Government to enable management and control to be uniform. To achieve this objective, the Federal Government would take over all the rights, obligations, assets and liabilities which were vested with the local councils at that time.

[63] In regard to liabilities, the Federal Government would take over the local council's existing debts ("hutang piutang"). It seems to me that the Federal Government would also have had to take over any liabilities arising out of approvals related to sewerage system given by local councils prior to 1993. If such liabilities were not taken over, then the underlying object of the Sewerage Services Act may not be achieved because there would still exist residual issues against local councils. Which runs contrary to the purpose of the Sewerage Services Act to have the Federal Government become the umbrella body.

[64] To complete the picture, since the Sewerage Services Act was replaced by the WSI Act in 2006, all liability arising out of DBKL's approval given in the 1970s (which originally became vested with the Federal Government in 1993 *via* the Sewerage Services Act) would be passed on to SPAN because SPAN is now in charge of sewerage system.

[65] The "savings" provision in s. 186 of the WSI Act reads:

186. Savings

Subject to Chapter 2 of this Part, any registration, instruction, act, order, direction, approval or decision done, made or given before the appointed date under any written law relating to:

(a) water supply system or sewerage system; and

(b) water supply services or sewerage services,

A which is consistent with this Act shall be deemed to have been done, made or given under this Act and shall continue in full force and effect in relation to whom they apply until amended or revoked under this Act or its subsidiary legislation or until the date of the expiry of the registration, instruction, act, order, direction or decision.

B **Relief Sought Might By Defendant Against DBKL Cannot Be Granted As A Matter Of Law**

[66] DBKL is essentially being asked to indemnify D from all of P's claims. In its statement of claim against DBKL, D prayed for the following reliefs:

C (i) full indemnity by DBKL on any claims by P as stated in his statement of claim against D;

(ii) a declaration order that DBKL carries out and supervise the immediate repair work of the sewerage system at P's property in order to ensure the flow of the sewerage system from D's property to the public D sewerage system is restored; and

(iii) general damages, interest and cost.

[67] The primary relief sought by P against D is declaratory and injunctive. In his statement of claim, P prayed for the following reliefs:

E (i) a declaration that there is a blockage in D's sewerage system and P is not responsible for the blockage;

(ii) a declaration that D and its agent have no right to access or use the private sewerage system located within P's property;

F (iii) an injunction to restrain D and its agent from accessing or using the private sewerage system located at P's property;

(iv) an injunction for D to install private septic tank in D's property or alternatively to connect D's sewerage system directly to the public G sewerage system;

(v) an order to prevent D and its agent from releasing any spillage of sewage into P's property; and

(vi) damages, interest and cost.

H **[68]** In my opinion, the indemnity sought by D against DBKL cannot be granted because the relief that P seeks is against D in person. For instance, the declarations sought relates to the rights of P and D *inter se*. DBKL is in no position to give an indemnity on either declaration of rights of the parties *inter se* or injunctive orders sought to restrain D, as those reliefs are personal I to D.

[69] Furthermore, D seeks a declaration order that DBKL is to carry out and supervise the immediate repair work of the blockage located within the sewerage system connecting P's property and D's property. Such a relief cannot be granted in law since DBKL is not cloaked with any powers on matters related to sewerage system. Neither under the SDB Act or the WSI Act is DBKL empowered to carry out remedial works on sewerage system.

[70] As such, an additional ground for me to strike out this action is because it is brought to obtain relief which the court has no power to grant. I refer to the Court of Appeal case of *Tuan Hj Ishak Ismail v. Leong Hup Holdings Bhd & Other Appeals* [1996] 1 CLJ 393; [1996] 1 MLJ 661 at 680 which said:

> There is an added dimension to O. 18 r. 19(1), in that the court will also strike out 'if the action has been brought to solely to obtain relief which the court has no power to grant' … or if relief be asked on a ground which is no ground for such relief.

Other Arguments By Defendant

[71] D argued that DBKL ought to first ensure that SPAN gave its approval re P's new sewerage system before the development order is issued for the renovation work. Since DBKL issued the development order before SPAN's approval, it is in breach of s. 70(3)(c) of the SDB Act which reads:

> (3) No plans for the erection of a building shall be approved:
>
> …
>
> (c) before any other conditions which the local authority may deem necessary to impose have been complied with.

[72] This point, however, was never pleaded in either D's statement of claim against DBKL or its affidavit to oppose encl. 48. On this score alone, I would be entitled to disregard the argument. Nevertheless, I considered this point and concluded it was misconceived. Section 70(3)(c) of the SDB Act does not apply on the facts of the present case. There is no condition imposed by DBKL that SPAN's approval re sewerage systems must first be secured before the development order is issued. There is nothing in the SDB Act or the By-Laws which requires this.

[73] The development order stands on its own and independent of any approval given by SPAN. It is not inter-dependent or contingent thereto, as D puts it. In the absence of such a condition being imposed by DBKL, the issue of compliance does not arise. It is also not for DBKL to "force" P to secure any other approval needed. Instead, it behoves P to secure all requisite approvals from all relevant regulators before carrying out the renovation work.

[74] D says there is no evidence as to whether SPAN did give any such approval and that this is a triable issue. However, whether any approval from SPAN was secured in this case is for P to explain. If at all, it is a triable issue between P and D. It is not a triable issue against DBKL.

[75] D referred to s. 77 of the SDB Act which reads:

> No building shall be erected over any public sewer, private connection pipe, public surface or storm water drain, culvert, water-course, river or stream or any water main, electric cable or wire without the prior written permission of the local authority **or the controlling statutory authority concerned** as the case may be. (emphasis added)

[76] D argues that since "public sewer" and "private connection pipe" come within s. 77 of the SDB Act, it is for DBKL to first give its written permission to P before he can erect his property over these "public sewer" and "private connection pipe". With respect, this argument is erroneous.

[77] Section 77 of the SDB Act applies to a variety of infrastructure such as storm water drain, culvert, river, stream, water pipe, electric cable, etc, some of which do not come under the purview of DBKL. As such, s. 77 of the SDB Act is worded widely to ensure appropriate permission is secured from either the local authority "or the controlling statutory authority concerned", as the case may be. DBKL is not the controlling statutory authority in relation to "public sewer".

[78] D argues that DBKL "possess documents that may shed light on the matter" and thus, should remain as a party since there may be liability attributable to them. However, it is entirely open to D to subpoena DBKL's personnel to appear as witness and produce relevant documents. D cannot go on a "fishing expedition" by naming DBKL in the hope that some liability may arise and be affixed against DBKL at the end.

Plain And Obvious Case

[79] At this interlocutory stage, I refrain from making any determination concerning the merits or otherwise of P's claim or D's defence and counterclaim. I make no finding regarding the sewerage system problem as to what caused it and who is liable to rectify the problem. Whether it be P or his architect or contractor, D, Indah Water or SPAN. My only finding is that DBKL is not answerable with respect to the matters alleged by D.

[80] In arriving at my decision, I have examined the applicable legislation. I do not see that as an impediment to employing the summary process of setting aside the third party action against DBKL. The material facts insofar as DBKL is concerned are not substantially disputed. I did not conduct a trial on conflicting affidavit evidence. Having evaluated the statute law, the

inescapable conclusion is that D's claim against DBKL is obviously unsustainable. This issue is capable of resolution without the need for a full trial or taking *viva voce* evidence during trial. I am guided by the following principles.

[81] Whether it is plain and obvious that a suit should be struck out does not depend on the length of time it takes to argue an application to strike it out. Rather the question is whether, when the point has been argued, it becomes plain and obvious that there can be but one result. It can become plain and obvious that a claim cannot succeed after a relatively long and elaborate hearing. (See the English Court of Appeal cases of *McKay & Anor v. Essex Area Health Authority & Anor* [1982] 1 QB 1166 at pp. 1176-1177; *Drummond-Jackson v. British Medical Association & Ors* [1970] 1 WLR 688 at pp. 695-696).

[82] Thus in a suit involving complex questions of law but where the essential facts are not in dispute, the complexity of the questions of law should not be a reason for refusing relief under O. 18 r. 19 of the Rules of Court 2012. If the court is satisfied that the questions of law are unarguable, the court is not prevented from granting summary relief merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand". (See the Court of Appeal case of *Khairy Jamaluddin v. Dato' Seri Anwar Ibrahim* [2013] 6 CLJ 849 at p. 859; [2013] 4 MLJ 173 at p. 182).

[83] In *Raja Zainal Abidin Raja Tachik & Ors v. British-American Life & General Insurance Bhd* [1993] 3 CLJ 606 at pp. 611-612; [1993] 3 MLJ 16 at p. 24, the Supreme Court remarked that the lower court should have scrutinised the evidence in order to decide whether the action was bound to fail. The court held that an action can be summarily disposed if there is an absence of conflict of material evidence or of conflict of affidavits on material points. So that seemingly triable or difficult issues could be readily decided in such a way as to lead to the conclusion that the action was bound to fail.

Conclusion

[84] For the reasons above, I am satisfied that D's action against DBKL is bound to fail. I therefore allowed encl. 48 and set aside D's third party action against DBKL. I ordered D to pay costs of RM5,000 to DBKL.